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### STATE E-DISCOVERY

# Rulings Address Defamation On Interactive Sites, in E-Mail

Interactive Web site communications can run the gamut from disparaging others to exchanging information about both good and bad business experiences. Misuse of an interactive site or a social network, however, may create liability in New York for such wrongful conduct. Counsel should be aware of such potential liability, even for an anonymous blogger who wants to hide his identity on an out-of-state site, as well as the limitations thereon, certain of which may be found in the Communications Decency Act of 1996 (CDA).<sup>1</sup>

Also, prospective litigants should be reminded that a defamation claim can flow from electronically disseminated information, which communications may also form the basis for alleging a tortious interference with contract cause of action.

In *Finkel v. Facebook*,<sup>2</sup> a defamation action against the social networking site Facebook, the court dismissed the cause of action against it predicated upon the CDA, where plaintiff failed to claim that Facebook “had any hand in creating the [allegedly defamatory] content.”

Plaintiff alleged that four fellow high school classmates, also individually named as defendants, created a “group” on Facebook in which they posted defamatory comments about plaintiff that had negative sexual and medical connotations. The court found that the CDA

[b]y its plain language, §230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, §230 precludes courts from entertaining claims that would place a computer service provider in a publisher’s role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred... Congress made a policy choice, however, not to deter harmful online speech through

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the separate route of imposing tort liability on companies that serve as intermediaries for other parties’ potentially injurious messages<sup>3</sup>...Congress has made a different policy choice by providing immunity even where the interactive service provider has an active, even aggressive role in making available content prepared by others. In some sort of tacit quid pro quo arrangement with the service provider community, Congress has conferred immunity from tort liability as an incentive to Internet service providers to self-police the Internet for obscenity and other offensive material, even where the self-policing is unsuccessful or not even attempted.<sup>4</sup>

The court rejected plaintiff’s argument that Facebook’s “Terms of Use” provided networking site with an “ownership interest” in the alleged defamatory content and, therefore, the immunity provided under §230 would not be available to Facebook. The court denied awarding sanctions predicated on such argument because “plaintiff’s argument as to liability based upon ownership

of defamatory content [sic] is not contrary to any prior precedent nor does the movant cite any precedent that renders such argument frivolous.”

In *Intellect Art Multimedia Inc. v. Milewski*,<sup>5</sup> plaintiff sued the alleged defamer and Xcentric Ventures, LLC, the operator of a site known as Ripoff Report ([www.ripoffreport.com](http://www.ripoffreport.com)). The individual defendant, Milewski, was a student in plaintiff’s college-level program held in Switzerland.

Plaintiff alleged Milewski was disruptive and failed to pay tuition, resulting in his expulsion from the program. Plaintiff also alleged Milewski posted a report using a false identity<sup>6</sup> on Ripoff Report accusing it of being, among other things, a “bait & switch company,” “making false promises” and being run by two “incompetent people.”

Plaintiff alleged that Xcentric “‘plays a significant role in creating, developing, or transforming the information provided by it users’ and that the very name and nature of Ripoff Report is designed to ‘elicit’ and ‘prompt’ users to publish ‘defamatory information.’”

Plaintiff further alleged Xcentric “‘offers to enroll companies and/or individuals in a program by which Xcentric will follow-up with the aggrieved individuals or entities’ to resolve complaints posted on Ripoff Report,” that it “‘has ‘rights’ to Milewski’s postings via Xcentric’s Terms of Service,” and that Xcentric “‘drafted its own headline to draw attention to Milewski’s posting.’”

Notwithstanding more detailed allegations alleged by plaintiff than in *Finkel*, to the extent the defamation claim was premised upon statements made by Milewski and/or other users of Ripoff Report, the trial court dismissed the cause of action against Xcentrix under the CDA. However, with respect to plaintiff’s claim that Xcentrix created the defamatory headings on its site, such claim was dismissed under CPLR Rule 3016(b), because plaintiff had not sufficiently plead the “alleged defamatory statements authored by Xcentrix.”

Plaintiff, no doubt appreciating the obstacles to her lawsuit, also alleged a “novel” products liability claim against Xcentric on the ground that Ripoff Report constituted a “product” so as to hold Xcentric strictly liable for any “injury.”

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The court ruled that it was not “persuaded that this website in the context of plaintiff’s claims is a ‘product’ which would otherwise trigger the imposition of strict liability. Here, plaintiff’s claims arise from the fact that the website is a forum for third-party expression...[and] what it offers is the ‘service’ of following up with posters and resolving their complaints.”

In any event, the court held that plaintiff failed to allege that the site was in a “defective condition” which gave rise to its claimed injury [loss of enrollment].

Lastly, the court noted that plaintiff’s claim that Ripoff Report was “defectively designed to elicit defamatory statements from its user is devoid of commonsense and reasoning, is unsupported by law, and is therefore, reject[ed].”

#### New York Jurisdiction

As discussed in a previous article, entitled “Long-Arm Jurisdiction, E-Mail and Web Sites,”<sup>7</sup> courts continue to confer jurisdiction over “interactive” Web sites in New York based on long-arm jurisdiction. In *Intellect Art*, supra, the court denied a jurisdictional motion to dismiss made by Xcentric, an out-of-state site, where

given the high degree of interactivity of the website, the undisputed fact that information is freely exchanged between website users, i.e., Milewski, and Xcentric, Xcentric’s alleged role in manipulating user’s information and data, and Xcentric’s solicitation of companies and individuals to ‘resolve’ the complaints levied against them on Ripoff Report.<sup>8</sup>

The court found that “due process” was satisfied by New York’s interest in redressing “harms that flow from defamatory statements directed to readers within its borders, even if plaintiff is a non-resident,” and that Xcentric’s activities “giving rise to plaintiff’s claims are such that it should have reasonably anticipated being hailed into New York court.”

#### Losing Anonymity

In *Grafstein v. Google Inc.*,<sup>9</sup> in an action converted to a summary proceeding that sought pre-action disclosure, the court ordered Google to provide plaintiff any information it possessed concerning the identity of the anonymous blogger(s) of the offending statements, after having assumed the truth of plaintiff’s affidavit that the statements accusing him of a crime were untrue.

Plaintiff had requested in its original plenary action that Google remove the comments made on the blog that he contended were defamatory and “to verify that similar [offending statements] were not posted in the future.”

Google opposed the relief sought as overbroad, vague, burdensome and on the ground that, because the court had not concluded that the statements actually constituted defamation, the relief sought constituted “a prior restraint of speech of Google’s users.”

The court held that plaintiff had not demonstrated an entitlement to an injunction ordering Google to remove the comments as “that would require, among other things, a determination that the statements [were] untrue, which [could] only be made in a separate action against the author or authors of the comments.”

#### E-Mail as a Weapon

In *IDX Capital LLC v. Phoenix Partners Group LLC*,<sup>10</sup> the court denied a motion to dismiss tortious interference, breach of fiduciary duty and libel claims predicated upon allegedly libelous e-mails sent to a third-party, and the unauthorized use of plaintiff’s computer systems to undermine a certain corporate transaction.

Specifically, plaintiffs claimed defendants used information wrongfully obtained from the plaintiff company through the improper use of its computer system for purposes of securing information concerning the impending transaction. Attached to the complaint were the relevant e-mails utilizing pseudonym sender names, which allegedly contained “false, defamatory and disparaging” information about, among others, a principal of plaintiff.

Plaintiffs also alleged defendants sent documents from a related dissolution proceeding that were disparaging toward representatives of the plaintiff company. Plaintiff company alleged that as a result of defendants’ conduct in transmitting defamatory e-mails and documents, the third party reneged on the transaction.

Plaintiffs further asserted that, even after the third party backed out of the transaction, defendants sent additional e-mails and posted comments about one of the individual plaintiffs on a publicly accessible message board, sent harassing e-mails to his family, and generally embarked on a campaign to destroy the individual plaintiffs’ professional and personal reputations.

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The court held that plaintiffs’ allegations that defendants improperly accessed plaintiff’s computer system, used anonymous e-mails and other wrongful means to block the transaction, and that the transaction would have been consummated “but for” defendants’ acts, were sufficient to allege a claim for tortious interference with business relations.

Further, the court sustained the libel claim where the e-mails contained specific false statements that were alleged to have been “sent out of personal spite or ill will, and with reckless disregard for the statements’ truth or falsity.”

The court also held that plaintiffs’ allegations concerning unauthorized access to the company computer system without permission alleged a claim for breach of fiduciary duty.

Finally, the court rejected defendants’ motion to strike “scandalous or prejudicial” material

from the complaint, pursuant to CPLR 3024(b), where the materials sought to be stricken were defendants’ own e-mails and text messages, which formed the basis for plaintiffs’ claims.

#### Conclusion

Attorneys should know that the creation and/or use of “interactive” Web sites may cause a site operator or a blogger to be subject to jurisdiction in New York. Individuals using social networking and interactive sites also should be mindful that, depending on the alleged wrongful conduct, courts may not permit their identity to remain anonymous.

Additionally, the CDA extends to protect site and social networking operators for defamatory statements posted by others, but, depending on the degree of the operator’s involvement in such postings or Web site, immunity may not be absolute.

Individuals should further be cautioned that e-mails are not an informal means of communicating for which defamation liability will not attach. The same care taken in writing a letter should be taken when sending an e-mail, as e-mails may form the basis for, among other things, breach of fiduciary duty and tortious interference with contract claims.

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1. 47 U.S.C. § 230.
  2. *Finkel v. Facebook Inc.*, Index No. 102578/2009 (Sup. Ct. N.Y. Co., Sept. 15, 2009).
  3. *Id.* (quoting *Zaeran v. America Online Inc.*, 129 F.2d 327, 330 (4th Cir. 1997)).
  4. *Id.* (quoting *Blumenthal v. Drudge*, 992 F. Supp 44, 52 (D.C. 1998)).
  5. *Intellect Art Multimedia Inc. v. Milewski*, 2009 WL 2915273 at \*1, 7, Index No. 117024/2008 (Sup. Ct. N.Y. Co., Sept. 11, 2009).
  6. Plaintiff had cross-moved to amend its complaint as well as to seek discovery that would identify four other anonymous users who posted on Ripoff Report. The court declined to order such discovery as plaintiff’s allegations did “not arise from postings made by these users.” *Id.* at \*7.
  7. Mark A. Berman, NYLJ, March 31, 2009.
  8. See *Intellect Art*, at \*6.
  9. *Grafstein v. Google Inc.*, Index No. 103562/2009 (Sup. Ct. N.Y. Co., Oct. 9, 2009).
  10. *IDX Capital LLC v. Phoenix Partners Group LLC*, Index No. 102806/2009, 2009 WL 2842053 at 2 (Sup. Ct. N.Y. Co., Aug. 27, 2009).

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